In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1952

JOHN RICHARD TOSINI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the evidence was insufficient to sustain his conviction for kidnapping.

After a jury-waived trial in the United States District Court for the Southern District of Georgia, petitioner was convicted of kidnapping, in violation of 18 U.S.C. 1201. He was sentenced to two years' probation. The court of appeals affirmed *per curiam* (Pet. App. A-15).

In May 1973, petitioner and two companions, all of whom were stationed at the Marine Base at Paris Island, South Carolina, gave one Finch $150 for the purchase of marihuana. Finch pocketed the money without delivering the marijuana. Some two months later, petitioner and his two companions located Finch at a bar in Savannah, Georgia. They beat Finch, forced him into their car, and at knife point demanded the return of their $150. They

then drove off with him in the car and after beating him again and taking a small amount of money from him, drove (from Georgia) to a deserted area in South Carolina, where they forced him out and left him. (Pet. App. A-3--A-6). The district court held that the evidence established (1) the transportation in interstate commerce (2) of an unconsenting person who (3) was held for ransom, reward, or otherwise and (4) that petitioner's conduct was knowing and willful (Pet. App. A-14).

Petitioner contends that the Federal Kidnapping Act "was not intended to create a 'new' crime as such but was to provide a means by which Federal law enforcement authorities could intervene in the investigation and apprehension of individuals who committed the traditional crime of kidnapping in the various states" and therefore cannot apply to a case in which money is not extorted from a person other than the immediate victim (Pet. 14). While the statute as originally enacted in 1932 required that the transported person be held "for ransom or reward", the act was broadened in 1934 so as to read "for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof." *Gooch* v. *United States*, 297 U.S. 124. Whatever validity petitioner's contention may have had under the original act, it has none under the 1934 amendment. The conduct of petitioner was plainly within the proscription of the statute. *United States* v. *Healy*, 376 U.S. 75, 81-82; *United States* v. *Sierra*, 452 F. 2d 291 (C.A. 10); *Gawne* v. *United States* 409 F. 2d 1399, 1403 (C.A. 9); *Brooks* v. *United States*, 199 F. 2d 336 (C.A. 4).

Nor does petitioner show any authority for his interpretation of the statute. Contrary to the situation in *Chatwin* v. *United States*, 326 U.S. 455, upon which petitioner relies, Finch was clearly deprived of his liberty. Petitioner's plea ~~tht~~ but his actions were justified by the prior miscon-

duct of Finch (Pet. 26), is without merit. Regardless of the provocation, petitioner's conduct was seriously wrong and was forbidden by the statute. The provocation given by Finch was adequtely recognized by the court in the sentence (two years' probation) imposed.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1974.